

#### **IC 36-9-27.4**

#### **Chapter 27.4. Removal of Obstructions in Mutual Drains and Natural Surface Watercourses**

##### **IC 36-9-27.4-1**

##### **"Drain" defined**

Sec. 1. As used in this chapter, "drain" refers to a mutual drain (as defined in IC 36-9-27-2).

*As added by P.L.239-1996, SEC.3 and P.L.240-1996, SEC.2.*

##### **IC 36-9-27.4-2**

##### **"Drainage board" defined**

Sec. 2. As used in this chapter, "drainage board" means the following:

- (1) Except as provided in subdivision (2):
  - (A) the county board of commissioners, as provided in IC 36-9-27-5(a)(1); or
  - (B) the drainage board appointed by the board of commissioners under IC 36-9-27-5(a)(2).
- (2) In a county having a consolidated city, the board of public works of the consolidated city, as provided in IC 36-9-27-5(b).

*As added by P.L.239-1996, SEC.3 and P.L.240-1996, SEC.2.*

##### **IC 36-9-27.4-3**

##### **"Natural surface watercourse" defined**

Sec. 3. As used in this chapter, "natural surface watercourse" means an area of the surface of the ground over which water from falling rain or melting snow occasionally and temporarily flows in a definable direction and channel.

*As added by P.L.239-1996, SEC.3 and P.L.240-1996, SEC.2.*  
*Amended by P.L.276-2001, SEC.17.*

##### **IC 36-9-27.4-4**

##### **"Obstruction" defined**

Sec. 4. (a) As used in this chapter, "obstruction" means a condition that:

- (1) exists within or near a drain; and
  - (2) prevents or significantly impedes the flow of water through the drain.
- (b) The term includes the following:
- (1) The presence of:
    - (A) one (1) or more objects inside or near a drain;
    - (B) a quantity of materials inside or near a drain; or
    - (C) damage to a drain;that prevents or significantly impedes the flow of water through the drain.
  - (2) Obstructions that:
    - (A) are created intentionally; and
    - (B) occur naturally or are created unintentionally.

*As added by P.L.239-1996, SEC.3 and P.L.240-1996, SEC.2.*

**IC 36-9-27.4-5****"Owner" defined**

Sec. 5. As used in this chapter, "owner" means a person who holds a possessory legal interest in land.

*As added by P.L.239-1996, SEC.3 and P.L.240-1996, SEC.2.*

**IC 36-9-27.4-6****"Person" defined**

Sec. 6. As used in this chapter, "person" means an individual, a corporation, a limited liability company, a partnership, or any other legal entity.

*As added by P.L.239-1996, SEC.3 and P.L.240-1996, SEC.2.*

**IC 36-9-27.4-7****"Respondent" defined**

Sec. 7. As used in this chapter, "respondent" means an owner of the tract of land that is the subject of a petition seeking the removal of an obstruction under this chapter.

*As added by P.L.239-1996, SEC.3 and P.L.240-1996, SEC.2.*

**IC 36-9-27.4-8****"Tract" defined**

Sec. 8. As used in this chapter, "tract" means an area of land that is:

- (1) under common fee simple ownership;
- (2) contained within a continuous border; and
- (3) a separately identified parcel for property tax purposes.

*As added by P.L.239-1996, SEC.3 and P.L.240-1996, SEC.2.*

**IC 36-9-27.4-9****Petition for removal of obstruction**

Sec. 9. If:

- (1) a person who owns a tract of land seeks the removal of an obstruction from a drain or natural surface watercourse located outside the person's tract in order to promote better drainage of the person's tract; and
- (2) the owner of the land on which the obstruction is located, upon request, does not remove the obstruction;

the person seeking the removal of the obstruction may file a petition under this chapter asking the drainage board in the county in which the obstruction is located to remove, or authorize or order the removal of, the obstruction under this chapter.

*As added by P.L.239-1996, SEC.3 and P.L.240-1996, SEC.2.*

**IC 36-9-27.4-10****Required contents of petition**

Sec. 10. A petition filed by a person described in section 9(1) of this chapter must include the following:

- (1) A general description of the tract of land owned by the petitioner.

(2) A general explanation of the need for the removal of the obstruction.

(3) A general description of the site of the obstruction.

*As added by P.L.239-1996, SEC.3 and P.L.240-1996, SEC.2.*

#### **IC 36-9-27.4-11**

##### **Filing fee**

Sec. 11. The drainage board may require, as a condition of filing a petition under this chapter, the payment of a filing fee. The drainage board may not set the filing fee at an amount greater than is reasonably necessary to defray the expenses incurred by the board in processing a petition.

*As added by P.L.239-1996, SEC.3 and P.L.240-1996, SEC.2.*

#### **IC 36-9-27.4-12**

##### **Investigation by county surveyor; duties of drainage board after receiving report of obstruction**

Sec. 12. (a) If a petition filed under this chapter alleges the obstruction of:

- (1) a drain; or
- (2) a natural surface watercourse;

the county surveyor of the county in which the obstruction is alleged to exist shall promptly investigate whether the obstruction exists.

(b) If the county surveyor, upon investigation, finds an existing obstruction in a drain or natural surface watercourse in the location alleged in the petition, the county surveyor shall report the existence of the obstruction to the drainage board.

(c) Upon receiving a report from the county surveyor under subsection (b), the drainage board shall:

- (1) set a date for a hearing on the petition; and
- (2) serve notice of the hearing on each owner of the land on which the obstruction exists who can be identified in the records of the county recorder.

(d) The hearing must be held at least thirty (30) days but less than ninety (90) days after the date of the filing of the petition.

(e) Notice of a hearing must be mailed to each respondent with return receipt requested.

*As added by P.L.239-1996, SEC.3 and P.L.240-1996, SEC.2.*

*Amended by P.L.276-2001, SEC.18.*

#### **IC 36-9-27.4-13**

##### **Postponement and rescheduling of hearing**

Sec. 13. Before or on the date of a hearing held under this chapter, the drainage board may postpone and reschedule the hearing if:

- (1) it appears that a respondent has not been served with notice; or
- (2) the interests of fairness otherwise compel a postponement.

*As added by P.L.239-1996, SEC.3 and P.L.240-1996, SEC.2.*

#### **IC 36-9-27.4-14**

**Findings of board**

Sec. 14. (a) If, after a hearing held under this chapter, the drainage board finds that:

- (1) the obstruction of a drain or a natural surface watercourse that is alleged in the petition exists; and
- (2) the removal of the obstruction will:
  - (A) promote better drainage of the petitioner's land; and
  - (B) not cause unreasonable damage to the land of the respondents;

the drainage board shall find for the petitioner.

(b) If, after a hearing held under this chapter, the drainage board is unable to make the findings described in subsection (a), the drainage board shall deny the petition.

*As added by P.L.239-1996, SEC.3 and P.L.240-1996, SEC.2.*

**IC 36-9-27.4-15****Drainage board determining whether obstruction created intentionally**

Sec. 15. If the drainage board finds for the petitioner under section 14(a) of this chapter, the board shall determine, based upon a preponderance of the evidence, whether the obstruction of the drain or natural surface watercourse was created intentionally by any of the respondents.

*As added by P.L.239-1996, SEC.3 and P.L.240-1996, SEC.2.*

**IC 36-9-27.4-16****Duty of board upon finding of intentional obstruction**

Sec. 16. (a) If the drainage board finds:

- (1) for the petitioner under section 14(a) of this chapter; and
- (2) under section 15 of this chapter that the obstruction of the drain or natural surface watercourse was created intentionally by at least one (1) of the respondents;

the drainage board shall enter an order directing the respondents to remove the obstruction at their own expense, or directing the county surveyor to remove the obstruction at the expense of the respondents.

(b) A respondent against whom an order is entered under subsection (a) is subject to an action under section 22 of this chapter if the respondent fails to pay the amount for which the respondent is responsible under the order.

*As added by P.L.239-1996, SEC.3 and P.L.240-1996, SEC.2.*

**IC 36-9-27.4-17****Duty of board upon finding of unintentional obstruction**

Sec. 17. If the drainage board:

- (1) finds for the petitioner under section 14(a) of this chapter; and
- (2) does not find under section 15 of this chapter that the obstruction of the drain or a natural surface watercourse was created intentionally by any of the respondents;

the drainage board shall enter an order under section 18 or 19 of this

chapter concerning the removal of the obstruction.  
*As added by P.L.239-1996, SEC.3 and P.L.240-1996, SEC.2.*

#### **IC 36-9-27.4-18**

##### **Additional duties of board; natural surface watercourses**

Sec. 18. (a) If:

- (1) a petition filed under this chapter concerns a natural surface watercourse; and
- (2) the drainage board:
  - (A) finds for the petitioner under section 14(a) of this chapter; and
  - (B) does not find under section 15 of this chapter that the obstruction of the natural surface watercourse was created intentionally by any of the respondents;

the drainage board shall enter an order under subsection (b).

(b) Upon a determination made under subsection (a), the drainage board shall enter an order:

- (1) authorizing the petitioner to remove the obstruction; or
- (2) directing the county surveyor to remove the obstruction at the expense of the petitioner.

(c) The drainage board shall consult with the:

- (1) petitioner;
- (2) respondents; and
- (3) county surveyor;

before deciding whether to enter an order under subsection (b)(1) or (b)(2).

(d) If the drainage board enters an order under subsection (b), the order may require the petitioner to bear the expenses of removing the obstruction, including the monetary value of the harm and inconvenience that the respondents will incur as a result of the removal of the obstruction.

*As added by P.L.239-1996, SEC.3 and P.L.240-1996, SEC.2.*

#### **IC 36-9-27.4-19**

##### **Additional duties of board; drains**

Sec. 19. (a) If:

- (1) a petition filed under this chapter concerns a drain; and
- (2) the drainage board:
  - (A) finds for the petitioner under section 14(a) of this chapter; but
  - (B) does not find under section 15 of this chapter that the obstruction of the drain was created intentionally by any of the respondents;

the drainage board shall enter an order under subsection (b).

(b) Upon a determination made under subsection (a), the drainage board shall enter an order:

- (1) authorizing the petitioner to remove the obstruction;
- (2) authorizing the respondents to remove the obstruction;
- (3) directing the county surveyor to remove the obstruction; or
- (4) directing that the obstruction be removed through the joint

efforts of at least two (2) of the persons referred to in this subsection.

(c) If an order is issued under subsection (b), the costs of removing the obstruction must be borne by the owners of all the tracts of land that are benefited by the drain. The order of the board must do the following:

- (1) Identify all tracts of land that are benefited by the drain.
- (2) Identify the owners of the tracts of land referred to in subdivision (1):
  - (A) who are known to the drainage board; or
  - (B) whose identity can be determined through the records of the county auditor.
- (3) Apportion the costs of removing the obstruction among the tracts of land that are benefited by the drain, assigning to each tract a certain percentage of the total costs.
- (4) Order the owners of each tract of land referred to in subdivision (1) to pay an amount equal to the product of the total costs of removing the obstruction multiplied by the percentage assigned to the tract under subdivision (3).

(d) The percentage of the total costs assigned to a tract under subsection (c)(3) must correspond to the ratio of the total length of the drain to the length of the particular segment of the drain that benefits the tract.

*As added by P.L.239-1996, SEC.3 and P.L.240-1996, SEC.2.  
Amended by P.L.276-2001, SEC.19.*

#### **IC 36-9-27.4-20**

##### **Landowners jointly and severally responsible for costs of obstruction removal**

Sec. 20. (a) All the owners of a tract that is the subject of an order issued under section 19 of this chapter are jointly and severally responsible for the payment of the amount determined under section 19(c)(4) of this chapter.

(b) An owner of a tract who pays all of or a portion of the amount may bring an action to obtain contribution from an owner of the tract who did not pay an equal or a greater portion of the amount.

(c) An owner of a tract that is the subject of an order issued under section 19 of this chapter is subject to an action under section 22 of this chapter if the owner fails to pay the amount for which the owner is responsible under the order.

*As added by P.L.239-1996, SEC.3 and P.L.240-1996, SEC.2.*

#### **IC 36-9-27.4-21**

##### **Order authorizing advance on general drain improvement fund for payment of obstruction removal expenses**

Sec. 21. In entering an order concerning the removal of an obstruction under this chapter, a drainage board may:

- (1) provide for the costs of the removal work to be paid directly by one (1) or more of the persons subject to the order; or
- (2) authorize an advance on the general drain improvement fund

established in the county under IC 36-9-27-73 for the payment of the costs of the removal work and provide for the amount advanced to be reimbursed by one (1) or more of the persons subject to the order.

*As added by P.L.239-1996, SEC.3 and P.L.240-1996, SEC.2.*

#### **IC 36-9-27.4-22**

##### **Recovery of unpaid amounts or expenses**

Sec. 22. (a) If a person who is required by an order of a drainage board under this chapter to pay an amount or bear an expense does not comply with the requirement, the amount for which the person is responsible may be recovered by:

- (1) the drainage board, as custodian of the general drain improvement fund, if the amount was advanced from the general drain improvement fund; or
- (2) another person subject to the order who has paid the amount and is entitled to reimbursement.

(b) An amount may be recovered from a person under subsection (a) through an action in a court having jurisdiction in the same manner that a creditor may recover an amount owed under a contract. In an action brought under this subsection, the plaintiff may also be awarded costs and reasonable attorney's fees.

*As added by P.L.239-1996, SEC.3 and P.L.240-1996, SEC.2.*

#### **IC 36-9-27.4-23**

##### **Judicial review**

Sec. 23. (a) If the drainage board finds for a petitioner after a hearing held under this chapter, a respondent may file an action in the circuit or superior court of the county in which the alleged obstruction exists seeking to have the order entered by the drainage board vacated.

(b) An action filed under subsection (a) must be based on at least one (1) of the following assertions by the respondent:

- (1) The drainage board lacked authority to act under this chapter.
- (2) The drainage board erred in making the findings described in section 14(a) of this chapter.
- (3) The respondent should have been awarded compensation for harm and inconvenience, or the amount awarded to the respondent for harm and inconvenience is insufficient.
- (4) The drainage board did not follow the procedure required by this chapter.

*As added by P.L.239-1996, SEC.3 and P.L.240-1996, SEC.2.*

#### **IC 36-9-27.4-24**

##### **Remedies**

Sec. 24. (a) In an action filed under section 23 of this chapter, the court:

- (1) shall enter an order vacating the order of the drainage board directing the county surveyor to remove the obstruction; and

(2) may issue an injunction against the removal of the obstruction;  
if the court makes a finding under subsection (b).

(b) The court is required or authorized to act under subsection (a) if the court finds that the drainage board:

- (1) was clearly in error in making its findings under section 14(a) of this chapter with respect to the alleged obstruction; or
- (2) exceeded its authority or discretion under the law in authorizing the removal of the obstruction.

*As added by P.L.239-1996, SEC.3 and P.L.240-1996, SEC.2.*

### **IC 36-9-27.4-25**

#### **Right of entry onto land**

Sec. 25. (a) For the purposes of this chapter:

- (1) a county surveyor;
- (2) a member of a drainage board; or
- (3) an authorized representative of a county surveyor or drainage board;

has a right of entry over and upon a tract of land containing a drain or natural surface watercourse that is the subject of a petition filed under this chapter.

(b) The right of entry granted by this section is limited to the land lying within seventy-five (75) feet of the drain or natural surface watercourse. The seventy-five (75) feet must be measured at right angles to:

- (1) the center line of any tiled drain; and
- (2) the top edge of each bank of an open drain; and
- (3) the edge of any natural surface watercourse;

as determined by the county surveyor.

(c) A person exercising a right of entry under this section shall, to the extent possible, use due care to avoid damage to:

- (1) crops, fences, buildings, and other structures located outside the right-of-way; and
- (2) crops and approved structures located inside the right-of-way.

(d) Before exercising a right of entry under this section, an individual must give oral or written notice of the entry on the land to the property owner of record. The notice must state the purpose for the entry.

(e) A right of entry under this section is not criminal trespass under IC 35-43-2-2, and an individual exercising a right of entry under this section may not be arrested or prosecuted for criminal trespass under IC 35-43-2-2.

*As added by P.L.239-1996, SEC.3 and P.L.240-1996, SEC.2.*